Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

ZUZANA J. DILLON, PERVIZ CHOKHANI, AND ELIN-KAI GOTTSCHALK,

Petitioners,

versus

COLIN POWELL, *et al.*,

and

CAROLEE BRADY HARTMAN, *et al.*,,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals conflicts with this Court's holding in *Pioneer Inv. Serv. Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993) and *Stutson v. United States*, 516 U.S. 193 (1996), where the Circuits are split as to whether *Pioneer* applies to timeliness of filing proofs of claim in class actions and are also split on whether the lower courts must analyze all of the *Pioneer* factors in deciding whether there has been "excusable neglect."

2. Whether the decision of the Court of Appeals that petitioners were given constitutionally adequate notice conflicts with this Court's teachings in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983).

PARTIES TO THE PROCEEDINGS

Petitioners are Zuzana J. Dillon, Perviz Chokhani and Elin-Kai Gottschalk

Respondents are defendants in the district court, Colin Powell, Secretary of State of the United States, *et al.*, and plaintiffs in the district court, Carolee Brady Hartman, and the class of approximately 1,093 women who were awarded relief by the district court.

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Petitioners Zuzana J. Dillon, Perviz Chokhani and Elin-Kai Gottschalk respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 15, 2001. App. at 1a.[1] A timely filed Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on June 14, 2001. App. at 3a.

OPINIONS BELOW

The opinion of the Court of Appeals, affirming the lower court's judgment is not reported. App. at 1a. 2001 WL 410461. The Order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* is not reported. App. at 9a. The District Court's Judgment and the oral opinion denying petitioners' motions to participate in the settlement of the class action or to file proofs of claim are not reported. App. at 16a. The District Court's Order denying petitioners' motion for reconsideration is not reported. App. at 6a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Amendment V of the Constitution of the United States

> [N]or shall any person be . . . . deprived of life, liberty or property, without due process of law.

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[1]References to the Appendix to this Petition are the page number followed by "a."

Fed.R.Civ.P. 6(b)

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

INTRODUCTION AND STATEMENT OF THE CASE

This case arises from efforts by petitioners to file proofs of claim and share in the $508 million settlement of a class action sex discrimination suit filed against the United States Information Agency in 1977 under Title VII of the Civil Rights Act of 1964. The lower courts ruled that petitioners failed to demonstrate "excusable neglect" for not timely filing proofs of claim. The courts failed to consider each of the four factors set forth in *Pioneer Inv. Serv. Co. v. Brunswick Associates L.P.*, 507 U.S. 380, 390 (1993), ("*Pioneer*"), as they were required to do, and as other courts of appeal have done in identical or similar circumstances. There is a clear split in the Circuits as to the applicability of *Pioneer* to this Rule 23 class action and whether the lower courts must consider all four of the *Pioneer* factors in determining whether there was "excusable neglect."

This case also involves questions of exceptional importance affecting the due process rights of class members in Title VII "all cash" settlements, who are precluded from filing proofs of claim and participating in the settlement of mandatory class actions. It is undisputed petitioners did not receive notice of their right to file proofs of claim to obtain monetary relief prior to the 1989 deadline. Petitioners sought relief from the district court prior to the entry of final judgment and the district court denied their request to file

proofs of claim and participate in the settlement.

1. History of the Litigation

This litigation began on November 25, 1977, when respondent Hartman filed a complaint alleging discrimination against herself and other women on the basis of sex by the United States Information Agency ("USIA"). This case was appealed and the Court of Appeals entered its opinion and order on August 27, 1982, *DeMedina v. Reinhardt,* 686 F.2d 997 (D.C. Cir. 1982).

On remand, on November 16, 1984, U.S. District Judge Richey found that plaintiffs had established that defendants were liable for discrimination in hiring as to the entire female class members consisting of women who applied for jobs to the USIA between October 8, 1974 through November 16, 1984. *Hartman v. Wick*, 600 F. Supp. 361, 375 (D.D.C. 1984); *Hartman v. Wick*, 678 F. Supp. 312, 328 (D.D.C. 1988). The district court also found that federal respondents had a policy of destroying employment applications containing the addresses of class members up to the finding of liability of November 16, 1984 "or even a few months thereafter." *Id.*

In 1989, Judge Richey ruled that class members would be entitled to monetary relief and that Foreign Service positions would be awarded to some class members. Two different notices were sent to class members in 1989, one for hiring relief and the other for monetary relief. The court ordered that proof of claim forms for monetary relief must be postmarked on or before July 15, 1989. The court found that because "notice by mail is not a practicable method for reaching the vast majority of the plaintiff class, defendant will also have to provide notice through wider-reaching channels." *Hartman v. Wick*, 678 F. Supp. at 329.

On April 5, 1994, the D.C. Circuit issued its opinion, *Hartman v. Duffy*, 19 F.3d 1459 (D.C. Cir. 1994), and remanded for additional findings on class certification. Following remand, on January 6, 1995, Judge Richey

allowed numerous new intervenors to become class representatives sixteen years after the filing of the case. *Hartmanv. Duffy*, 158 F.R.D. 525, 532 (D.D.C. 1995). The district court further found that the "evidence set forth in the current record leads to the conclusion that intervention and certification of the applicant class is proper at this time" because the plaintiffs had "presented ample evidence that common issues of fact exist to support a finding that certification of the Plaintiff class at this time is proper [1995] under Rule 23." *Id.* at 544. The finding on class certification was affirmed by the Court of Appeals. *Hartman v. Duffy*, 88 F.3d 1232 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997).

The district court ordered an initial fifty class members to participate in *Teamsters* hearings to determine the amount of relief, if any, to which each was entitled. The special master appointed by the district court to adjudicate these hearings determined that three of the fifty women, six percent of them, Carolee Brady Hartman, Wai Soo Wong Koo, and Luba Medina, were entitled to nothing. *See Consent Decree*, Filed March 22, 2000 (*"Consent Decree"*) at Exhibit No. 1, at 2-4. Six class members were awarded less than $80,000 and Rose Kobylinski was awarded $17,585 at her *Teamsters* relief hearing. *See Consent Decree* at Exhibit No. 1.

TERMS OF THE SETTLEMENT

Under the terms of the settlement proposed by the respondents and approved by the district court on June 27, 2000, 1,093 class members received an equal share in the all cash settlement of $508 million in this sex discrimination suit, irrespective of whether the class member was awarded relief at her *Teamsters* hearing and irrespective of the amount awarded at such hearing. Under the terms of the settlement, three class members, who had already lost their *Teamsters* relief hearings and ***had been awarded no relief*** were allowed

to participate in the settlement and to receive awards of more than $450,000 each. *Id.* at Exhibit No. 1, at 2-4.

Of those 1,093 women, 1,068 filed by the July 15, 1989 deadline, twenty-five class members did not file by that deadline, and some did not file until almost two years later. *See Joint Pre-Hearing Brief In Support of the Consent Decree* at 9. Until the final approval of the settlement, those twenty-five late filing women were in the same position as the three petitioners herein. However, the status of these twenty-five late filing class members changed on June 27, 2000, when the district court reversed its prior decision and amended the July 15, 1989 deadline, but only for twenty-five class members. In approving the settlement, the court allowed those twenty-five class members to participate in the settlement, as well as the three class members found to be entitled to nothing, but, at the same time, denied the same opportunity to petitioners.

PETITIONERS' CLAIMS

1. Perviz Chokhani

Ms. Chokhani is a member of the original plaintiff class because she applied for at least two positions with USIA during the class period in 1981 and 1982. Ms. Chokhani applied for positions with USIA after working as a writer/editor at the Department of the Interior, where she also worked as a public affairs specialist. USIA has an Application Control Record that shows that on June 7, 1982, Ms. Chokhani applied for a position as an International Radio Broadcaster. Nevertheless, Ms. Chokhani was continuously denied a full-time position with the agency.

A native of Tanzania, Ms. Chokhani also served as a public information officer with the Ministry of Information and Broadcasting in Tanzania. At the time of her application, she was fluent in Swahili, English, French and Hindi. Ms. Chokhani made a point to place no restrictions on her

employment opportunities with the USIA. She advised the agency that she was willing to work anywhere in the world, on any shift, on either a full-time or part-time basis. She passed all tests administered to her, including a writing test, and performed well at the one interview she was granted. In addition, Ms. Chokhani already held a security clearance at the U.S. Department of the Interior.

USIA never notified Ms. Chokhani of the pending class action, and she never received any mailing from USIA regarding a claim for monetary relief in 1989, or at any time thereafter. She never received a copy of the court's January 18, 1998 Relief Order from USIA or from any other government agency.

In 1991, Ms. Chokhani timely filed a claim for the Foreign Service Officer portion of the relief ordered by Judge Richey, the only claim she ever received from USIA. Ms. Chokhani never received notice of her right to obtain monetary relief. Consequently, Ms. Chokhani did not learn of her right to obtain monetary relief as a member of the *Hartman* class until 2000, when she read newspaper articles describing the settlement of the class action.

Instead, USIA claimed to have sent the notice and proof of claim to petitioner's former address, in spite of the fact that she was living in northern Virginia at the time. It would have taken USIA little effort to contact Ms. Chokhani about the class action because there was only one "Chokhani" in the Northern Virginia phone book in 1989. However, USIA never called her to tell her that she was entitled to file a proof of claim and never sent her a proof of claim. It was not until early 2000, when she read a newspaper article did she learn she was a member of the plaintiff class and that USIA failed to provide her with notice. Ms. Chokhani immediately contacted class counsel, who advised her to seek independent representation.

On May 19, 2000, she promptly retained counsel to represent her. On May 31, 2000, Ms. Chokhani sought relief

from the Court arguing that since USIA had her address and social security number [based on the fact that Ms. Chokhani received the notice for the Foreign Service Officer portion of the relief], the agency should have sent her notice regarding the availability of monetary relief.

Ms. Chokhani demonstrated "excusable neglect" and circumstances beyond her control for her failure to timely file a proof of claim form and to participate in the settlement on the grounds that she never received any notice of her right to seek monetary relief and that she acted promptly and in good faith after learning she was a class member. Ms. Chokhani filed a motion objecting to her exclusion from settlement and argued that USIA was required to give her actual notice of all of her rights as a class member and its failure to do so violated Fed.R.Civ.P. 23 and the due process clause of the Constitution. The district court denied this motion, overruled Ms. Chokhani's objections to her exclusion from the settlement and denied her motion for reconsideration.

2. Dr. Zuzana J. Dillon

Dr. Dillon is a member of the original plaintiff class because she applied for employment with USIA during the class period. From November 1978 to January 1979, and for several months thereafter, Dr. Dillon sought employment with USIA after learning about an opening in the Czech Section of the Voice of America. She was continuously denied a full-time position with the agency despite her outstanding education and work background. Dr. Dillon was more than qualified to work in the Czech Section, as she is a native Czech speaker, and earned a Ph.D. in political science with a doctoral dissertation on the use of radio and television in shaping political beliefs. In fact, Dr. Dillon was teaching Czech language courses at the Foreign Service Institute when she applied for the Voice of America Opening in 1977.

Dr. Dillon advised USIA that she was willing to work anywhere in the world, on any shift, on either a full-time or

part-time basis--the best offer USIA offered her was a position as a Czech broadcaster who worked part-time and only on week-ends. Further, Dr. Dillon was advised she had done well on the voice broadcasting and translation tests required by USIA. She had already obtained the requisite security clearances because she was employed by the State Department.

Dr. Dillon left the United States in March 1980 to join her husband, a Foreign Service Officer assigned to the U.S. Embassy in Turkey. Prior to her departure, she advised USIA officials of her new address and the federal agency which employed her husband. Dr. Dillon expressed her continued interest in full-time employment with the USIA. Specifically, Dr. Dillon advised USIA that she would return to the United States immediately if USIA offered her a full-time position.

In spite of having Dr. Dillon's information, USIA never notified Dr. Dillon of the pending class action or her right to seek relief. Dr. Dillon never received any mailing from USIA in 1989 or at any time thereafter. She never received a copy of the court's January 18, 1998 Relief Order from USIA or from any other government agency.

Instead, USIA claimed to have sent the notice and proof of claim to the Alexandria, Virginia address where Dr. Dillon lived in 1980–prior to her notifying USIA of her move to Turkey. USIA ignored Dr. Dillon's updated information and failed to even look in the Northern Virginia telephone directory where she was listed. Dr. Dillon had been employed by another federal government agency in Virginia since 1983 and was easy to locate. Nevertheless, USIA made no attempt to telephone her about the class action, even though it is undisputed that USIA's records demonstrate the agency knew in 1989 that Dr. Dillon never received a notice by certified mail because the mailing sent to her was returned to the USIA.

Dr. Dillon first learned she had been excluded from

the class action sex discrimination litigation against USIA in December 1996, when she was located by counsel for the plaintiff class, who were preparing for relief hearings pursuant to the Order of this Court and wanted her to testify. When meeting with plaintiffs' class counsel on January 20, 1997, she saw for the first time a document indicating that USIA claimed as part of its defense to the claims of another class member that the agency had offered her a full-time position in 1980. In fact, this document was fabricated because USIA never offered Dr. Dillon a full-time position and she was not living at the address where USIA claimed to have contacted her.

Class counsel recommended that Dr. Dillon seek independent counsel. Dr. Dillon promptly retained counsel and sought relief from the court. On September 30, 1998, the district court denied Dr. Dillon's motion to file her proof of claim, even though USIA knew Dr. Dillon never received the court-ordered notice. The district court failed to consider that the *Teamsters* hearings were still taking place and no settlement had been reached, and it was obvious that USIA had failed to provide Dr. Dillon with the court-ordered notice informing her of her right to monetary relief.

Dr. Dillon demonstrated "excusable neglect" and circumstances beyond her control which accounted for her failure to timely file a proof of claim form and to participate in the settlement on the grounds that she never received any notice of her right to seek monetary relief and that she acted promptly and in good faith after learning she was a class member. Dr. Dillon filed a motion objecting to her exclusion from settlement, and argued that USIA was required to give her actual notice of all of her rights as a class member and its failure to do so violated Fed.R.Civ.P. 23 and the due process clause of the Constitution. The district court denied this motion, overruled Dr. Dillon's objections to her exclusion from the settlement and denied her motion for reconsideration.

3. Elin Kai-Gottschalk

Ms. Gottschalk is a member of the original plaintiff class because she applied for employment with USIA during the class period. Ms. Gottschalk was denied employment with both the Voice of America and the USIA for more than a decade–from November 1978 to January 1989. During that time, Ms. Gottschalk applied regularly for positions at USIA, and made herself available without restriction. Ms. Gotttschalk was willing to work full-time or part-time, in any location world-wide, and on any shift available. However, USIA refused to hire her.

Ms. Gottschalk's broadcasting and writing experience are impressive, thus making her more than qualified for a permanent position at USIA. Her communications experience stretched back to 1959, when she studied acting, began writing fiction, and entered the world of radio. She worked for the BBC for eight years prior to moving to the United States. In 1968, and again in 1976, petitioner broadcast for a PBS station in Philadelphia, WUHY-FM. Even during the time she applied with USIA, she performed free-lance broadcasts in Estonian (her native language) for the VOA and Radio Free Europe-Radio Liberty.

Ms. Gottschalk had published novels, short stories, newspaper columns, poetry and magazine articles in both English and Estonian since the 1960s. She was reviewed by *The New York Times,* and received a prestigious award for her broadcasting for Radio Netherland in 1971. Nonetheless, USIA told Ms. Gottschalk that she had failed their required broadcasting and language tests. This was in spite of the fact that she already had the requisite security clearance because of the work she had done for Radio Free Europe.

Despite the court's order, USIA never notified Ms. Gottschalk of the pending class action or her right to seek relief. Ms. Gottschalk never received any mailing from USIA in 1989 regarding the class action at issue here, or at

any time thereafter. Neither did she receive a copy of the court's January 18, 1998 Relief Order from USIA or any other government agency

In fact, USIA claimed it mailed the court-ordered Notice in 1989 to a Florida address Ms. Gottschalk had provided earlier, instead of the current address Ms. Gottschalk provided in her January, 1989 job application. In spite of this address change, Ms. Gottschalk's phone number remained the same from 1980 through the notice period. However, USIA never made any attempt to telephone her about her class action status even though it is undisputed that USIA's records demonstrate the agency knew in 1989 that Ms. Gottschalk never received a notice by certified mail because the mailing was returned to the agency.

Ms. Gottschalk learned of the instant litigation from a 1999 newspaper article describing the class action and the same discrimination she had faced when she had applied for USIA positions. Ms. Gottschalk immediately contacted class counsel to see how to preserve her valuable property interest in the class. Class counsel recommended that she seek her own independent counsel. In April 2000, Ms. Gottschalk was finally able to locate counsel to take her case. On May 31, 2000, Ms. Gottschalk promptly sought to file a notice of claim form. The motion was denied by the district court even though it was undisputed that Ms. Gottschalk never received notice.

Petitioner Gottschalk was easy to locate for several reasons. First, USIA had her social security number and her current address from her January, 1989 job application. Second, when Ms. Gottschalk moved from her prior address, she moved less than 100 yards and kept the same phone number she had used since 1980. Respondents never called her to advise her of the litigation; nor did they advise her of the right to participate in the suit.

Ms. Gottschalk demonstrated "excusable neglect" and circumstances beyond her control for her failure to timely file

a proof of claim form and to participate in the settlement on the ground that she never received any notice of her right to seek monetary relief and that she acted promptly and in good faith after learning she was a class member. Ms. Gottschalk filed a motion objecting to her exclusion from settlement, and argued that USIA was required to give her her actual notice of all of her rights as a class member and its failure to do so violated Fed.R.Civ.P. 23 and the due process clause of the Constitution. The district court denied this motion, overruled Ms. Gottschalk's objections to her exclusion from the settlement and denied her motion for reconsideration on equitable grounds.

4. Requests for Relief

Each petitioner filed motions seeking relief from the district court ***prior*** to the entry of final judgment. Each petitioner herein timely filed formal objections to exclusion from the settlement and each petitioner appeared through counsel at the June 27, 2000 "fairness hearing" to further object from her exclusion from the settlement. Petitioners filed a Rule 59 motion for reconsideration. Petitioners subsequently filed a motion to intervene for the purpose of filing an appeal, which was granted by the district court.

DECISION OF THE DISTRICT COURT

Plaintiffs sought declaratory and injunctive relief and the class was certified under Rule 23(b)(2). However, at the time of the "fairness hearing," class counsel advised the court that the class members now include "27 class members we know are deceased." In addition, "[m]any of the women moved on to other careers. Many of them are now retired." *Transcript* at 30-31. On June 27, 2000, without changing the Rule 23(b)(2) class certification, the district court approved a settlement which allowed 1,093 class members to share in the all-cash settlement of $508 million in this sex discrimination suit. *Id.*

The district court acknowledged that it is "difficult to find where to draw a principled line in a case like this, particularly where 25 women who filed after the announced deadlines became members of the plaintiff class." App. at 13a. The district court concluded that: "Adding four people to 1100 might not terribly upset the settlement expectations of the rest of them, but adding 74 certainly would." App. at 14a. The district court never addressed the significance of the fact that the delay in petitioners' seeking relief from the court was caused by the federal respondents and that petitioners had acted in good faith. App. at 6a.

The district court appeared to acknowledge that petitioners had not received notice through no fault of their own, but held that the notice was "the best that could be fashioned at the time." App. at 14a. The district court continued: "The law says that's good enough. I do not think there is a due process issue here; and accordingly, those motions will be denied." App at 14a.

A short time later in the hearing, during consideration of the class settlement, the district judge expressed his belief that: "I have no power to tinker with this settlement" and continued by stating that "my decision here has to be up or down." App at 14a-15a.

On July 12, 2000, the district court entered an Order denying petitioners' requests for relief. On August 14, 2000, the court entered judgment in favor of the class in the amount of $508 million. On September 19, 2000, the district court denied petitioners' Rule 59 motion for reconsideration. App. at 6a. On September 25, 2000, the district court granted petitioners' motion to intervene for the purpose of taking an appeal. App. at. 7a. On October 4, 2000, petitioners timely filed a Notice of Appeal.

DECISIONS OF THE COURT OF APPEALS

The Court of Appeals held that the district court retained the power under Federal Rules of Civil Procedure

6(b)(2) and 23(d) to enlarge the time for filing claims after expiration of the claim period should it find "excusable neglect," and that the district court appropriately exercised its discretion in declining to allow petitioners to join the 1,100 member class. App. at 3a. In support of its decision, the Court of Appeals cited this Court's case of *Pioneer, supra*, and mentioned two of the factors set forth in *Pioneer*. Although the Court of Appeals recognized that the district court appropriately considered evidence of prejudice to other parties and judicial administration of the case, the Court of Appeals never addressed whether the delay was within the reasonable control of petitioners or whether petitioners acted in good faith, as required by the *Pioneer* analysis. The Court of Appeals decision cited the first of three decisions captioned *In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 192-96 (3d Cir. 2000). App at 3a. However, the D.C. Circuit did not cite the subsequent Third Circuit decisions which reversed the district court for its failure to apply *Pioneer* to the precise facts at issue here. *In re Cendant Corp. Prides Litig.* 234 F.3d 166 (3rd Cir. 2000) ("*Cendant Prides II*") (vacating and remanding for failure to consider required factors); *In re Cendant Corp. Prides Litig.*, 235 F.3d 176 (3rd Cir. 2000) ("*Cendant Prides III*") (reversing denial of motion to participate in settlement).

The panel rejected petitioners' argument that the notice was inadequate, holding that the proper inquiry here is not whether petitioners actually received the notices, but instead whether the method of providing the notice was "'reasonably calculated, under all the circumstances,' to inform potential claimants of the class action and of their right to participate." App. at 4a. (Citation omitted)

The Court of Appeals ruled that the due process clause "does not amount to a guarantee of notice" and that procedures prescribed by the court and carried out by USIA met the due process standard and the requirements of Rule 23. App. at 4a. The Court of Appeals rejected petitioners'

challenge to the certification, even though it was an all-cash settlement, ruling "[t]he nature of the settlement, providing equitable relief under Title VII, is consistent with class certification under Rule 23(b)(2)." App. at 4a.

The Court of Appeals denied petitioners' timely filed Petition for Rehearing and Suggestion for Rehearing *En Banc*. App. at 11a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISIONS BELOW ARE CONTRARY TO THIS COURT'S HOLDINGS IN *PIONEER INV SERV. CO. V. BRUNSWICK ASSOCIATES, L.P.*, 507 U.S. 380 (1993), AND *STUTSON V. UNITED STATES*, 516 U.S. 193 (1996). THE CIRCUITS ARE SPLIT AS TO WHETHER *PIONEER* AND *STUTSON* APPLY TO FILING PROOFS OF CLAIM IN CLASS ACTIONS AND WHETHER THE LOWER COURTS MUST ANALYZE ALL OF THE *PIONEER* FACTORS IN DECIDING WHETHER THERE HAS BEEN "EXCUSABLE NEGLECT."

This Court carefully explained the standard of "excusable neglect" in *Pioneer*, *supra*, which established the legal standard for determining when the court should allow a claimant in bankruptcy to file an untimely claim. In *Pioneer*, the Supreme Court addressed "excusable neglect" in the context of Fed.R.Bankr.P. 9006(b)(1) pursuant to Fed R.Civ.P.6(b)(2), governing the enlargement of time for filing proofs of claim in bankruptcy cases and also analyzed "excusable neglect" in the context of Fed.R.Civ.P. 60(b)(1). In *Stutson v. United States*, 516 U.S. 193 (1996), the Solicitor General acknowledged that the *Pioneer* standard also applies in Fed.R.App.P. 4 cases. Accordingly, this Court granted

certiorari after the Solicitor General advised that the position of the United States had changed. This Court then vacated and remanded that case to the Eleventh Circuit for further consideration in light of *Pioneer*. *Id.* at 197.

This petition raises the question of whether the lower courts must apply *Pioneer* to the filing of claims in class actions certified under Rule 23 and whether the lower courts must consider all of the *Pioneer* factors in deciding whether there is "excusable neglect" to justify an untimely filing. There is a clear split in the various circuits concerning the application of the *Pioneer* evaluative criteria and whether the courts must consider each factor in evaluating whether to allow the time for filing proofs of claim in Rule 23 class actions to be extended. There is a separate split in the circuits as to whether the lower courts are required to consider ***all*** of the *Pioneer* factors in determining whether to allow untimely filings in a wide variety of circumstances.

The *Pioneer* analysis requires a court to address 1) whether granting the delay will prejudice the debtor; 2) the length of the delay and its impact on efficient court administration; 3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; and 4) whether the creditor acted in good faith. *Pioneer*, 507 U.S. at 394. As the Second Circuit noted, "nothing in *Pioneer* limits its interpretation of 'excusable neglect' to the Bankruptcy Rules." *United States v. Hooper*, 9 F.3d 257, 259 (2d Cir. 1993). The *Pioneer* factors should apply to Rule 23 class actions as well, because the issue of whether to accept an untimely request to participate in a class action turns on whether the class members can demonstrate "excusable neglect," at this term is used in Fed.R.Civ.P. 6(b)(2).

A. Applicability of *Pioneer* Factors to Claims Filed Under Rule 23

Here, the Court of Appeals below found that the trial

court had the discretion to find the neglect to be excusable and deny the "extension request where, for example, there is evidence of prejudice to other parties or to judicial administration" of the cases. App at 3a. The D.C. Circuit cited this Court's decision in *Pioneer*, not for the analysis to determine excusable neglect, but merely to refer to two of the four *Pioneer* factors. The use of this signal "*see*" indicates the panel thought *Pioneer* supported their reliance on the two factors discussed in the panel's decision, but left the court free to ignore the other two *Pioneer* factors. The court of appeals did not find *Pioneer* was controlling and the panel's use of the signal "see" does not indicate reliance on the decision.

The D.C. Circuit cited *Pioneer* only for the proposition that the trial court has discretion to decline to find "excusable neglect" and deny a request for an extension of time. The D.C. Circuit ignored the third and fourth *Pioneer* factors. The delay in petitioners' filing their proofs of claim was solely the result of defendants' failure to give proper notice of their right to seek monetary relief in the class action. Petitioners acted promptly upon learning of the class action, which strongly favors allowing them to participate in the settlement pursuant to the *Pioneer* analysis. Since petitioners acted in good faith throughout, the fourth *Pioneer* factor also favors allowing petitioners to participate in the settlement. Since the D.C. Circuit failed to even consider the third and fourth *Pioneer* factors, the court could not properly weigh and balance all of the *Pioneer* factors. The lower court's equitable analysis was therefore erroneous as a matter of law.

The Third Circuit addressed the applicability of the *Pioneer* analysis in two decisions issued ***prior*** to the D.C. Circuit's panel's decision. *In re Cendant Corp. Prides Litig.*, 234 F.3d 166 (3rd Cir. 2000) ("*Cendant Prides II*") (vacating and remanding for failure to consider required factors); *In re Cendant Corp. Prides Litig.*, 235 F.3d 176 (3rd Cir. 2000)

("*Cendant Prides III*") (reversing denial of motion to participate in settlement). After the panel issued its March 2001 decision, but prior to the Court's consideration of Petitioners' Motion for Rehearing and Suggestion for Rehearing *En Banc*, the Third Circuit provided a detailed analysis of the *Pioneer* factors in a class action. *In re Orthopedic Bone Screw Products Liability Litig.*, 246 F.3d 315 (3rd Cir. 2001) ("*Bone Screw Products*") (error to exclude claimant from class settlement). In all of these cases, the Third Circuit takes a view squarely contrary to the analysis adopted by the D.C. Circuit.

The Third Circuit specifically held that this Court's *Pioneer* analysis controls the issue of extensions of time for filing proofs of claim in Rule 23 class actions. In *Cendant Prides II*, *Cendant Prides III*, and *Bone Screw Products*, the Third Circuit determined that district courts must use ***all*** of the *Pioneer* factors in evaluating denial of leave to file proofs of claim in class actions, not just some of them. In each of these three cases, the Third Circuit applied all four factors announced in *Pioneer* and reversed the respective district court's ruling as an abuse of discretion for excluding the class members merely because the class members failed to meet the deadline for filing proofs of claim. The Third Circuit's analysis of the "prejudice to the parties" factor is diametrically opposed to that of the D.C. Circuit. The D.C. Circuit merely considered the time that elapsed between those late filers who were allowed to participate in the settlement and those who were not allowed into the class. App. at 3a.

Under the Third Circuit's analysis of the first *Pioneer* factor, allowing petitioners to participate could not cause "prejudice" to defendants because defendants' liability was fixed. *Bone Screw Products*, 246 F.3d at 323; *Cendant Pride III*, 235 F.3d at 184. Similarly, defendants' liability here is capped by the settlement amount of $508 million.

The Third Circuit held that: "It cannot be maintained

that timely registrants are more deserving of remedy, for purposes of equity, than tardy registrants with similar claims, presuming the failure to register on time was indeed blameless." *Bone Screw Products*, 246 F.3d at 324. Thus, there can be no legal prejudice to other members of the class because petitioners are not less deserving of sharing in the settlement than those who filed claims in 1989; nor are petitioners less deserving than those twenty-five class members who filed after the1989 deadline, but whose untimely claims were allowed as part of the Consent Decree. *Id.* at 325.

Although the timely registrants would receive what is essentially a "windfall" comprised of some portion of the recovery that would be owed to the otherwise deserving late registrants, such as petitioners, the Third Circuit denied this was a legitimate factor to consider. Thus, even if there were a factual predicate for the "floodgates" argument, the lower court's reliance on this factor is error as a matter of law. The Court rejected this notion stating:

> It cannot be maintained that timely registrants are more deserving of remedy, for purposes of equity, than tardy registrants with similar claims, presuming the failure to register on time was indeed blameless. By excluding Sambolin and other similarly situated late registrants from the class, the timely registrants would receive what is essentially a 'windfall,' comprised of some portion of the recovery that would be owed to the otherwise deserving late registrants. As noted in *Cendant Prides II*, the loss of a windfall is not prejudicial.

Bone Screw Products, 246 F.3d at 324 (citation omitted).

The Third Circuit further noted that even assuming,

arguendo, that the recovery prejudices other class members, the "relatively small number of untimely claimants would have only a marginal" impact on the remaining claims. *Id.*, citing *Zients v. La Morte*, 459 F.2d 628, 630 (2d Cir. 1972). In *Zients*, a case where five class members did not receive notice of a settlement hearing or the deadline for filing claims, the court concluded that allowing five extra claims would result in "only a minuscule reduction in recovery by timely claimants, [because] the fund has not been distributed and the administration of the fund would be insignificantly hampered . . . . petitioners should be permitted to participate in the fund." *Id.* The Second Circuit permitted the untimely filing of claims because the claimants who did not receive notice of the filing deadline had *bona fide* claims. *Id.* The small number of late claims at issue here, only three out of 1,096, is clearly *de minimis*. Where the district court found there were only four claimants who sought relief from the district court, and only three of them have viable claims, allowing these late claims would barely cause a ripple in the settlement amount, reduction of less than three-tenths of a percent.[2] *See Eagle Bus Mfg., Inc. v. Rogers*, 62 F.3d 730, 738 (5th Cir. 1995) (district court should consider the size of the late claim and the impact the claim would have on the assets of the settlement).

The Third Circuit correctly applied the second

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[2]The district court postulated that an approximately seventy additional claimants might also seek to be included in the settlement. By definition, each of these approximately seventy women knew about the settlement *prior* to the "fairness hearing" and knew there would be a "fairness hearing." None of these class members took any steps to assert their rights. None of them filed objections with the district court or appeared at the "fairness hearing." Nor did any of these claimants seek to intervene or file appeals from the district court's decision excluding them from the settlement. Although the fourth objector, class member Whiten did seek relief in the district court and filed a Notice of Appeal from the district court's rejection of her request, the court of appeals dismissed her appeal as untimely on three separate occasions.

Pioneer factor, the potential impact of the delay on judicial proceedings, and held that any hindrance in the settlement fund administration "is too minimal to justify exclusion of [appellant's] claim on that basis." *Bone Screw Products*, 246 F.3d at 326. The Third Circuit reached this conclusion even though the claimant in that case did not file his claim until ***after*** the Rule 23 fairness hearing on the proposed settlement. *Id.*

The D.C. Circuit erred in assessing the alleged "prejudice" to judicial administration, which parallels the second *Pioneer* factor. Although there was a substantial delay between the time the defendants sent out the class notice and the time when petitioners sought relief from the court, this delay had absolutely no impact on the judicial proceedings or on the fund administration. The Third Circuit concluded that the equities were on the side of the late filers because the fund had not been distributed and the administration of the fund would be "insignificantly hampered by allowing these few late claims."*Bone Screw Products*, 246 F.3d at 326, citing *Zients*, 459 F.2d at 630-31. Since petitioners sought relief from the district court within the deadlines prescribed by the court and ***prior*** to the "fairness hearing," this factor militates even more strongly in favor of petitioners than it did for the class member in *Bone Screw Products*, 346 F.2d at 326.

In analyzing the third *Pioneer* factor, the reason for the delay, the Third Circuit noted that absent actual notice by mail to appellant's address, "it is incongruous, in the unique circumstances of this case, to find claimant culpable for his failure to receive notice. *Id.* at 327. Since the delay resulted from defendants' failure to give petitioners adequate, actual notice of their right to participate in the class action and since petitioners acted promptly upon learning of the class action, the third factor weighs heavily in petitioners' favor. "The constructive notice given to [appellant] was too minimal to impart blame upon him for his lack of awareness." *Id.* at

324.

In fact, many of the circuits which have addressed this issue have held that the four *Pioneer* factors do not carry equal weight and that determining the reason for the delay or which party is at fault are the most important factors to consider in making a determination of "excusable neglect." *Hospital Del Maestro v. NLRB*, __ F.3d __, 2001 WL 929887 (1st Cir. August 20, 2001); *United States v. Sisneros*, 2001 WL 733411 (10th Cir. 2001); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000); *Thompson v. E.I. DuPoint de Nemours & Co.*, 76 F.3d 530, 534 (4th Cir. 1996);

The Third Circuit also analyzed the fourth *Pioneer* factor, whether movants acted in good faith and found there was no basis for believing that they failed to act in good faith. *Bone Screw Products*, 246 F.3d at 322, 329. The D.C. Circuit completely failed to consider petitioners' good faith in its analysis of "excusable neglect."

The standard for determining whether petitioners' neglect of the deadline was "excusable" is a flexible standard because it is rooted in equity. *Pioneer*, 507 U.S. at 389. The Second Circuit observed that:

> Until the fund created by the settlement is actually distributed, the court retains its traditional equity powers. It is not novel law to announce that a court supervising the distribution of a trust fund has the inherent power and duty to protect the unnamed, but interested persons. In the words of Professor Chafee, the dean of equity law, these individuals are akin to "wards of the court.

Zients, supra, 459 F.2d at 630.

The Third Circuit similarly stated that the court plays the important role of protector of absentees' interests in a fiduciary capacity. *Bone Screw Products*, 346 F.3d at 322.

As the Third Circuit observed, "the aggregate nature of the class action in no way implies that the court's fiduciary duty to the whole class are somehow greater or more important than its duties to the individual members of the class." *Id.* Indeed, the district court has a special responsibility and duty to see to the administration of justice and to protect members of the class. *Id.* at 324 (citation omitted). The district court "retains the 'ultimate responsibility' for the protection of class members." *Cendant Prides I*, 233 F.3d at 194, *citing Maywalt v. Parker & Parsley Petroleum*, 67 F.3d 1072, 1078 (2nd Cir. 1995) (footnote omitted). Further, courts are required to be especially vigilant when reviewing proposed no-opt-out settlements. *See Manual for Complex Litigation*, §§ 30.42 at 238 (3d ed. 1995). Since the district court owed a fiduciary duty to class members, the court had a responsibility to "tinker" with this settlement to ensure that all class members, including petitioners, were treated fairly. *See Zients, supra*, 459 F.2d at 630. Until the approval of the settlement at the "fairness hearing," petitioners were as much members of the class as those twenty-five class members who also missed the 1989 deadline and those class members who lost their *Teamsters* hearings, but were still awarded relief. The preferential treatment give to certain class members, including the lead plaintiff,[3] "belies the principles of equity and the court's role as a fiduciary in class actions when allowing a claimant participation in settlement works no harm on the conduct of the proceedings and does not significantly prejudice the interests of the parties." *Bone Screw Products*, 346 F.3d at 316-317.

The Third Circuit found that the district court failed to perform a balancing of the equitable factors of excusable neglect. *Id.* at 329. The court concluded that since none of

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[3]The Court of Appeals previously found that one of the class members, Carolee Brady Hartman, is "out of the case" because she was found to be not qualified for the job she sought. *Hartman v. Duffy*, 88 F.3d 1232, 1236 (D.C. Cir. 1996).

the equitable factors supported the district court's result, its rejection of the untimely claim was necessarily in error. While a cut-off date is essential, "application of this principal must not be so rigid as to preclude recovery by a deserving claimant." *Id.* at 329 (citation omitted).

The D.C. Circuit failed to properly analyze the "prejudice and "judicial administration" issues and failed to even consider the third and fourth *Pioneer* factors, in contrast to the well reasoned approach of the Third Circuit. For these reasons, the court should grant the Petition for *Certiorari*. The lower court's rigid application in the year 2000 of the ***1989*** cutoff for filing proofs of claim to some, but not all, class members does not warrant precluding recovery by deserving claimants, contrary to the *Pioneer* standard. *Bone Screw Products*, *supra*. Here, where all the equities are on the side of the claimants, the fund has not been distributed and the administration of the fund would be insignificantly hampered by allowing these few late claims, petitioners should have been permitted to participate in the fund. *Pioneer*, 507 U.S. at 395; *Bone Screw Products*, 346 F.3d at 323. This Court should resolve the split between the Third Circuit and the D.C. Circuit regarding the application of *Pioneer* to filing proofs of claim in Rule 23 class actions.

B. Consideration of All Factors

The necessity of showing "excusable neglect" arises under many different civil and appellate rules outside of the context of Rule 23. With the exception of the D.C. Circuit's decisions in this case, all of the Courts of Appeal have applied *Pioneer* to their analyses of "excusable neglect" and all have concluded that a district court's failure to consider all ***four*** factors of *Pioneer* when evaluating an "excusable neglect" motion is an abuse of discretion, requiring reversal of the district court. *Walter v. Blue Cross & Blue Shield*, 181 F.3d 1198, 1201-1203 (11th Cir. 1999); *Stringfellow v. Brown*, 105 F.3d 670 (10th Cir. 1997) (to determine whether

neglect is excusable, court must take account of all relevant circumstances); *United States v. Cruz-Mendez*, 201 F.3d 449 (Table), 1999 WL 1015549 at *1, *2 (10th Cir. 1999); *Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994); *In re Sheehan*, 253 F.3d 507, 513-514 (9th Cir. 2001) (failure to apply all four *Pioneer* factors to Rule 4 motion requires reversal); *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000); *Alexander v. Principi*, 2001 WL 894285 (9th Cir. 2001) (failure to apply all four *Pioneer* factors requires reversal).

Similarly, the Eighth Circuit requires the district court to apply all four *Pioneer* factors in making the excusable neglect analysis. *Union Pacific Railroad Co. v. Progress Rail Services Corp.*, 256 F.3d 781, 783 (8th Cir. 2001). The Fifth and Second Circuits have taken a similar view. *Midwest Employers Cas. Co. v. Williams*, 161 F.3d 877, 879 (5th Cir. 1998) (equitable standard for evaluating excusable neglect takes account of all relevant circumstances surrounding a party's omission); *Eagle Bus Mfg., Inc. v. Rogers, supra*, 62 F.3d at 736; *In re Painewebber Ltd. Partnerships Litig.*, 147 F.3d 132, 135 (2nd Cir. 1998); *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250 (2d Cir.1997), *cert. denied*, 522 U.S. 1117 (1998); *See e.g., Raymond v. Int'l Business Machines Corp.*, 148 F.3d 63, 66 (2d Cir.1998); *LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2nd Cir. 1995).

The decision of the D.C. Circuit is alone among the circuits because there is absolutely no intellectual support for the view that the lower courts may ignore two of the *Pioneer* factors in determining "excusable neglect." *Pioneer* requires the courts "taking into account of all relevant circumstances surrounding the party's omission." 507 U.S. at 394 (footnote omitted). Further, the circuits which give more weight to one factor often look to the reason for the delay or who was at fault, factors which the D.C. Circuit never addressed in the analysis of petitioners' claims. If the lower courts had

considered all of the *Pioneer* factors, including the fact that the late filing was a product of defendants' failure to provide them with notice of their right to seek monetary relief, they would have reached a different conclusion.

In the wake of *Pioneer*, the Third Circuit has imposed a "duty of explanation" on district courts when they conduct "excusable neglect" analysis. *Cendant Prides II*, 234 F.2d at 171 (citation omitted). Where the lower courts breached this duty of explanation by failing to consider each of the four *Pioneer* factors and by failing to provide "point by point analysis" of the *Pioneer* factors, this court should grant *certiorari* to review the D.C. Circuit's failure to conduct a thorough, systematic application of the law to the facts. *Id.* at 174; *Cendant Prides III*, 235 F.3d at 184.

II. THE COURT SHOULD GRANT *CERTIORARI* BECAUSE THE DECISIONS BELOW DENY PETITIONERS DUE PROCESS OF LAW BECAUSE DEFENDANTS WERE REQUIRED TO PROVIDE ACTUAL NOTICE

In ruling that the notice sent to class members was constitutionally adequate, the lower courts failed to recognize that this Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) must be read in light of later Supreme Court cases. These include *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1986); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485, 491 (1988); and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Further, where, as here, a notice is sent by mail to an invalid address and when the government knows or learns that this address was incorrect, such notice does not satisfy constitutional due process

requirements. *Robinson v. Hanrahan*, 450 U.S. 38, 40 (1972).

"The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the loss and an opportunity to respond." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). The notice provided must be "reasonably certain to inform those affected." *Mullane v. Central Hanover, supra*, 339 U.S. at 315. Due process requires notice that is "reasonably calculated, under all the circumstances, to apprize potential class members of the action and afford them an opportunity to present their claims." *Id.* at 314. Due process "calls for such procedures as the particular situation demands." *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). Here, petitioners were denied their constitutional right to notice and an opportunity to respond.

There is no *per se* rule that notice by mail will always be constitutionally adequate. *U.S. v. One Toshiba Color Television*, 213 F.3d 147, 153 (3d Cir. 2000) (proper notice may "vary under the circumstances"). In some circumstances that due process requires actual notice be given prior to a deprivation of a property interest. *Id.* at 150. The "best notice practicable under the circumstances" requires more than the notice actually given and the use of mails is inadequate where, as a result of defendants' strategy of delay and their destruction of records, notices were sent to stale and incorrect addresses.

In *Shutts, supra,* 472 U.S. at 811-812, the court held that actual notice required in class actions certified by state courts. One commentator has concluded that: "*Shutts* presumptively stands for the proposition that all class members–and indeed all litigants whether in a (b)(3) class or otherwise–must be given an opportunity to be heard and participate in the adjudication of their cause of action." P. Woolley, "Rethinking the Adequacy of Adequate Representation," 75 *Tex.L.Rev.* 571, 557 (1997). Viewed in this light, *Shutts* stands for the proposition that due process

requires actual notice for all litigants, who, like petitioners, can be identified.

In the context of a state court probate proceeding, this Court concluded that where petitioners identity was known or "reasonably ascertainable," termination of their claims "without actual notice violated due process." *Tulsa Professional Collection Services, Inc. v. Pope, supra,* 485 U.S. at 800 (citations omitted). Similarly, where petitioners' identity was known by defendants, termination of their rights in this class action violated due process because petitioners never received actual notice of their right to seek monetary relief.

Further, this Court also held that where there is a threat of deprivation of a property right, reasonably diligent efforts are required to give notice and that actual notice is required, where this is feasible. *Mennonite Board of Missions, supra*, 462 U.S. at 798 n. 4, 800. Under the principles articulated in *Mennonite Board of Missions*, actual notice is required in a class action, where the name and address of an interested party are reasonably ascertainable. Due process requires that the party be given "[n]otice by mail or other means as certain to ensure actual notice." *Id.*

In *Ortiz v. Fibreboard Corp, supra,* "this Court strongly implied that a Rule 23(b)(1)(b) mandatory limited fund class action had to meet the same procedural requirements as to notice as Rule 23 (b)(3) actions." *Bone Screw Products, supra*, 246 F.3d at 328 n. 11. "Thus, *Ortiz* seems to imply (although it specifically declined to rule) that the level of notice required for a settlement . . . . is the same as is required in a rule 23(b)(3) action: the best notice practicable, including individual notice to all class members who can be identified through reasonable effort." *Id.* (citations omitted). Viewed in this light, *Ortiz* suggests this Court would rule that the notice requirements of Rule 23(c)(2) apply to all class actions and that actual notice is required for all class members who can be identified. *Id.*

Thus, USIA was required to do more than simply go through the motions of giving notice to class members. Due process required USIA to make additional efforts to locate petitioners beyond the perfunctory mailings to stale and incorrect addresses and instead, required the agency to put forth the effort "desirous of actually informing the absentee." *Mullane*, 339 U.S. at 315.

USIA had actual knowledge that at least two of the petitioners never received their court-ordered notices and proofs of claim because the notices sent by the agency to at least two of the petitioners were returned. Where the government knew that the notice was sent to an incorrect address, such notice does not satisfy constitutional due process requirements. *Robinson v. Hanrahan*, 450 U.S. at 40 (notice of state forfeiture proceedings was inadequate when mailed to claimant's home while claimant was imprisoned); *Froehl v. United States*, 238 F.3d 474, 478 (3d Cir. 2001) (fact question as to whether notice was sufficient precluded summary judgment in challenge to administrative forfeiture) (citations omitted).

The risk of erroneous deprivation was extremely high in the instant case because USIA knew that petitioners never received notice because the notices were returned and/or because the certified mail cards were not returned.[4] The risk of erroneous deprivation and the value of additional safeguards required actual personal notice. Where defendants have locator information, such as the class member's social security number and/or telephone number, due process clearly requires USIA to give each appellant actual notice of the class action and her right to file a proof of claim. The value of additional safeguards was substantial because with a modest amount of effort USIA could have

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[4] Any problems determining the petitioners' addresses were the fault of USIA because defendants destroyed the addresses of numerous prospective class members in violation of regulations requiring the agency to retain relevant personnel records. 29 *C.F.R.* § 1602.14.

provided actual notice to petitioners.

Despite this actual knowledge that petitioners had not received notice of their right to seek monetary relief, USIA refused to take the necessary steps, including using petitioners' telephone or Social Security numbers, to locate them. The government's interest is in the enforcement of the civil rights laws and defendants have no legitimate countervailing interest in denying actual notice where, at the time notice was sent, the court had already found USIA discriminated in hiring against this class of women. Thus, under the analysis set forth above, USIA denied petitioners the due process to which they were entitled under the Fifth Amendment to the Constitution.

CONCLUSION

The Petition for Writ of Certiorari should be granted to resolve these issues of national importance. Alternatively, petitioners request the Court grant their Petition, vacate the judgment below and remand to the U.S. Court of Appeals for the District of Columbia Circuit for application of all of the *Pioneer* factors. *Stutson v. United States*, supra, 516 U.S. at 197.

Respectfully submitted,

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No. 00-5356

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carolee Brady Hartman and All Other Plaintiffs, Approx. 50 additional plaintiffs,
Appellees,
Zuzanna J. Dillon, Dr.,
Appellants,

v.

Colin L. Powell, Secretary of State, et al.,
Appellees

March 15, 2001, Filed

COUNSEL:

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JUDGES:
BEFORE: Williams, Randolph, and Garland, Circuit Judges.

OPINION:

ORDER

Upon consideration of the motions for summary affirmance, the responses thereto, and the replies; and appellants' motion for summary reversal, the responses thereto, and the replies, it is

ORDERED, for the reasons stated in the accompanying memorandum, that the motion for summary reversal be denied, and the motions for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See *Taxpayers Watchdog, Inc. v. Stanley, 260 U.S. App. D.C. 334, 819 F.2d 294, 297 (D.C. Cir. 1987)* (per curiam); *Walker v. Washington, 201 U.S. App. D.C. 82, 627 F.2d 541, 545* (D.C. Cir.) (per curiam), cert. denied, *449 U.S. 994 (1980).*

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely

petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

MEMORANDUM

The district court has approved a $ 508 million settlement of this long-running Title VII class action against the United States Information Agency (USIA). The merits of the consent decree are not before us. This appeal challenges the district court's decision denying appellants leave to file untimely claims that would allow them to share in the settlement.

The deadline for filing claims was July 15, 1989. Nevertheless, the district court retained the power under Federal Rules of Civil Procedure 6(b)(2) and 23(d) to enlarge the time for filing claims after expiration of the claim period should it find excusable neglect. See *In re Cendant Corp. Prides Litig., 233 F.3d 188, 192-96 (3d Cir. 2000); In re Gypsum Antitrust Cases, 565 F.2d 1123, 1127-28 (9th Cir. 1977).* The determination whether neglect in a particular case is excusable is an equitable one, committed to the district judge's discretion. See *In re Cendant, 233 F.3d at 195-97.* Here, the district court recognized it had discretion to permit late claims and appropriately exercised that discretion in declining to allow appellants to join the 1,100 member class. See *Pioneer Inv. Serv. Co. v. Brunswick Associates L.P., 507 U.S. 380, 398, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* (recognizing that the trial court has discretion to decline to find the neglect to be excusable and deny an extension request where, for example, there is evidence of prejudice to other parties or to judicial administration of the case).

Drawing a line is essential to achieve certainty and finality in such a large class action. See *In re Gypsum, 565 F.2d at 1127.* And the district court did so in a principled way by using the 1991 Order of Reference to the special master as the cut-off point for new claims. See *Burns v. Elrod, 757*

F.2d 151, 155 & n.7 (7th Cir. 1985) (no inconsistency in the prior grant of other late petitions that were "less tardy" and had stronger equitable claims). Coming six to nine years after the last claims were accepted, appellants are not similarly situated to the 22 who were admitted to the class between 1989 and 1991 and participated in the remedial proceedings; therefore, the district court was not compelled to treat them the same way. See *In re Gypsum, 565 F.2d at 1128.*

Moreover, the district court acted within its discretion in approving the notice to potential class members as adequate and fair for the class as a whole. The proper inquiry here is not whether appellants actually received the notices but instead whether the method of providing the notices was "reasonably calculated, under all the circumstances," to inform potential claimants of the class action and of their right to participate. See *Peters v. National R.R. Passenger Corp., 296 U.S. App. D.C. 202, 966 F.2d 1483, 1486 (D.C. Cir. 1992)* (quoting *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15, 94 L. Ed. 865, 70 S. Ct. 652 (1950)).* The due process clause "does not amount to a guarantee of notice," *Peters, 966 F.2d at 1486,* and the district court correctly concluded that the procedures prescribed by the remedial order, *Hartman v. Wick, 678 F. Supp. 312, 328-33, 342-44 (D.D.C. 1988),* and carried out by the USIA met the due process standard and the requirements of Rule 23. Appellants' claim that the class was improperly certified for settlement pursuant to Rule 23(b)(2), instead of (b)(3), was not raised in appellants' objections to the district court and, hence, need not be considered. See *District of Columbia v. Air Florida, Inc., 243 U.S. App. D.C. 1, 750 F.2d 1077, 1084 (D.C. Cir. 1984).* In any event, the claim is without merit. The nature of the settlement, providing equitable relief under Title VII, is consistent with class certification under Rule 23(b)(2). See *Martini v. Federal Nat'l Mortgage Ass'n, 336 U.S. App. D.C. 289, 178 F.3d 1336, 1348-49 (D.C. Cir. 1999),* cert. dismissed, *528 U.S.*

1147 (2000); Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 896 (7th Cir. 1999); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415-16 (5th Cir. 1998).

For these reasons, we deny appellants' motion for summary reversal and grant appellees' motions for summary affirmance.

Civil Action No. 77-2019 (JR)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAROLEE BRADY HARTMAN, *et al.*,
Plaintiffs,

v.

MADELINE K. ALBRIGHT,
Secretary of State
and
MARC B. NATHANSON, Chairman,
Broadcasting Board of Governors,
Defendants.

Filed: September 19, 2000

ORDER

Upon consideration of the motion for reconsideration and to amend judgment filed by Perviz Chokhani, Zuzana Dillon, Elin-Kai Toona Gottschalk [#918] Joyce Whiten [#919-1, #919-2], and the entire record, it is this 19th day of September, 2000,

ORDERED that the motions are **denied**.

/s/

JAMES ROBERTSON
United States District Judge

Civil Action No. 77-2019 JR

Filed: September 26, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAROLEE BRADY HARTMAN, et al.
Plaintiffs,
And
Zuzannah DILLON, Elin-Kai TOONA Gottschalk, PERVIZ (WALJI) CHOKHANI
Intervenors,

v.

MADELINE K. ALBRIGHT,
Secretary of State
And
MARC B. NATHANSON, Chairman
Broadcasting Board of Governors.
Defendants.

ORDER

Upon consideration of the Motion to Intervene for the Purpose of Filing a notice of Appeal Filed by Class Members Perviz Chokhani, Zuzana Dillon and Elin- Kai Toona Gottschalk, the accompanying Memorandum of Points and Authorities, the Opposition thereto, and the entire record herein, it is this 25th day of September, 2000 hereby

ORDERED that the Motion to Intervene should be, and hereby is, granted; and it is further

ORDERED the Intervenors' Complaint is deemed filed; and it is further

ORDERED that Class Members Perviz Chokhani, Zuzana Dillon and Elin Gottschalk are plaintiffs in this action for the purpose of filing a Notice of Appeal.

JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

No. 00-5356

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carolee Brady Hartman and All Other Plaintiffs, Approx. 50 additional plaintiffs,
Appellees,
Zuzanna J. Dillon, Dr.,
Appellants,

v.

Colin L. Powell, Secretary of State, et al.,
Appellees

September Term, 2000
77cv02019

Filed on: June 14, 2001

BEFORE: Edwards, Chief Judge; Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mar J. Langer, Clerk

BY: /s/

Robert A. Bonner

Deputy Clerk

No. 00-5356

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carolee Brady Hartman and All Other Plaintiffs, Approx. 50 additional plaintiffs,
Appellees,
Zuzanna J. Dillon, Dr.,
Appellants,

v.

Colin L. Powell, Secretary of State, et al.,
Appellees

September Term, 2000
77cv02019

Filed on: June 14, 2001

BEFORE: Williams, Randolph and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed April 27, 2001, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT

Mark J. Langer, Clerk

BY: /s/

Robert A. Bonner

Deputy Clerk

Civil Action No. 77-2019 JR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAROLEE BRADY HARTMAN, et al.
Plaintiffs,
And
Zuzannah DILLON, Elin-Kai TOONA Gottschalk, PERVIZ (WALJI) CHOKHANI
Intervenors,

v.

MADELINE K. ALBRIGHT,
Secretary of State
And
MARC B. NATHANSON, Chairman
Broadcasting Board of Governors.
Defendants.

Courtroom 20
Washington, D.C.
Tuesday June 27, 2000
9:38 A.M.

TRANSCRIPT OF FAIRNESS HEARING
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

EXCERPTS

THE COURT: All right. It is difficult to find where to draw a principled line in a case like this, particularly where 25 women who filed after the announced deadlines became members of the plaintiff class; but I believe that I must and I will deny the motions of Ms. Chohani, Ms.

Dillon, Ms. Gottschalk, and Ms. - - Whiten and some of them are doctors, I'm sorry - - to join the class.

Adding four people to 1100 might not terribly upset the settlement expectations of the rest of them, but adding 74 certainly would.

I accept Mr. Fredrickson's statement that 70 women have contacted him - - more than 70 women - - seeking to be admitted to the class as he is a member of the bar of this Court and his representation is accepted as fact and will become part of the record on that basis. 74 people would certainly upset the settled expectations of the class; and, of course, if those 74 were accepted, who knows who else might be attracted by a settlement of this kind?

So, Mr. Karl, Mr. Ellis, you may have your record on this matter and you may take it where you wish; but I think I will and I must deny the motions of your clients to join the class. Perfect notice is not required. Hindsight is a powerful tool for figuring out how they might have been found; but the efforts that were made were deemed at the time - - this was before the Internet by the way - - to if not perfect, the best that could be fashioned at the time.

The law says that's good enough. I do not think there is a due process issue here; and accordingly, those motions will be denied.

Now, we will get on to the fairness hearing for the members who are members of the plaintiff class; and I think without a lot of windup, I think I should ask counsel if - - how they wish to proceed. If they have an agreement about how they wish to address the Court and present the matter? Mr. Fredrickson?

Tr. at 21-22

* * *

THE COURT: Well, as Mr. Fredrickson has pointed out with his typical tact but tenacity, I have no power to tinker with this settlement.

And, Ms. Snyder, I have no power to say well, you really should have done it this way or that way; my decision here has to be up or down.

Tr. at 52.

Civil Action No. 77-2019 (JR)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAROLEE BRADY HARTMAN, *et al.*,
Plaintiffs,

v.

MADELINE K. ALBRIGHT,
Secretary of State
and
MARC B. NATHANSON, Chairman,
Broadcasting Board of Governors,
Defendants.

Filed: July 12, 2000

ORDER

For the reasons stated in open court on June 27, 2000, it is this 12th day of July, 2000,

ORDERED that the motion of Elin-Kai Toona Gottschalk for leave to file proof of claim [#886] is denied. It is

FURTHER ORDERED that the motion of Zuzana Dillon for reconsideration of the order denying her an opportunity to file proof of claim [#890] is denied. It is

FURTHER ORDERED that the motion of Perviz Chokhani for leave to file proof of claim [#891] is denied. And it is

FURTHER ORDERED that the oral motion of Joyce Whiten for leave to file proof of claim is denied.